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No. 88-4

In the Supreme Court of the United States

OCTOBER TERM, 1988

VAN VOORHIS & SKAGGS, PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the Federal Savings and Loan Insurance Corporation (FSLIC), acting as receiver for Fidelity Savings and Loan Association, had the power to terminate a legal services contract between Fidelity and petitioner and to demand the return of prepaid and unearned fees.

2. Whether the court of appeals' decision requiring petitioner to return unearned fees interfered with Fidelity's right under the Due Process Clause to retain and consult counsel.

3. Whether the court of appeals abused its discretion by limiting further proceedings on remand of the case to the district court.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-7a) is reported at 838 F.2d 395. The court of appeals' subsequent order (Pet. App. 8a-10a) is reported at 842 F.2d 239. The district court's order and memorandum (Pet. App. 12a-18a) is unreported.

JURISDICTION

The court of appeals entered its judgment on February 4, 1988. A petition for rehearing was denied on March 29, 1988. The petition for a writ of certiorari was filed on June 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a California law firm, challenges a court of appeals decision allowing the federal receiver of an insolvent sayings and loan association to recover the association's advance payments for unrendered legal services.

Fidelity Savings and Loan Association (Fidelity) was a state chartered thrift institution with its principal place of business in Oakland, California. In the first two months of 1982, it lost over $9 million and was virtually insolvent. Aware that the Federal Home Loan Bank Board (Bank Board) was about to appoint the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for Fidelity,[1] Fidelity's directors took steps to establish a fund from Fidelity's assets to contest the Bank Board's actions. On March 26, 1982, they entered into a representation agreement with petitioner Van Voorhis & Skaggs and a second law firm, Angell, Holmes & Lea. The agreement provided that petitioner and the second law firm were to represent Fidelity in any action taken by the Bank Board, the FSLIC or the Federal Home Loan Bank of San Francisco that "interferes with the management of Fidelity Savings by its Board of Directors * * * including interference

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[1] The Bank Board is an independent agency in the Executive Branch of the United States organized pursuant to the Federal Home Loan Bank Act, 12 U.S.C. (& Supp. IV) 1421 *et seq.* Congress has given the Bank Board broad powers over the operation of the savings and loan industry, including the power to appoint the FSLIC as conservator or receiver for a federally insured savings and loan association, ex parte and without prior court approval, if the Bank Board determines that the statutory grounds exist. 12 U.S.C. (& Supp. IV) 1464(d)(6), 1729(c)(1)(B) and (c)(2). The Bank Board is also the operating head of the FSLIC, a corporate governmental agency that is responsible, pursuant to Title IV of the National Housing Act, 12 U.S.C. 1724 *et seq.*, for insuring the accounts of all federally-chartered savings and loan associations and most state-chartered savings and loan associations.

with the ability of such management to pursue said legal action by employing and compensating attorneys * * * " (E.R. 218).[2] The agreement further provided that the legal fees would be "deemed to have been earned upon payment" (E.R. 219-220). Fidelity deposited $250,000 in advance fee payments with each firm. See Pet. App. 2a-3a; E.R. 4.

On April 13, 1982—eighteen days after Fidelity executed these agreements—the Bank Board appointed the FSLIC as sole receiver for Fidelity pursuant to 12 U.S.C. 1729(c)(2). See FHLBB Resolution No. 82-248 (E.R. 115-118). By letter dated April 13, 1982, the receiver notified the two law firms that their "employment by Fidelity in all capacities, and with respect to all legal matters," was terminated effective as of the date of the letter (E.R. 155-159). In addition, the receiver demanded the return of the $250,000 advanced by Fidelity to each law firm (E.R. 155-159). On April 22, 1982, petitioner replied that it believed it had a duty to continue to represent Fidelity. Petitioner asserted that the receiver had been illegally appointed and that the receiver's demand for return of the payment made by Fidelity was improper (E.R. 163-164). See Pet. App. 4a-5a.

On September 19, 1983 the FSLIC, in its corporate capacity, filed this lawsuit in the United States District Court for the Northern District of California to recover the $250,000 in legal fees paid to each law firm.[3] Although

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[2] "E.R." refers to the Excerpts of Record filed by the FSLIC in the court of appeals.

[3] Immediately after the appointment of the receiver and after the termination of the agreements with petitioner and Angell, Holmes & Lea, the receiver transferred substantially all of the assets of the failed association to a new federal mutual association, Fidelity Federal Savings and Loan Association (Fidelity Federal). The receiver transferred the claim against petitioner and Angell, Holmes and Lea to the

the district court found that the "earned upon payment" provision was most probably void as against public policy, it concluded that the FSLIC was estopped from recovering the funds as it had waited one and a half years to file the lawsuit (Pet. App. 12a-17a). The court of appeals reversed that decision (*id.* at 1a-7a). It held that the receiver had an absolute right under both federal and state law to terminate the representation agreement, that the agreement's provision that fees would be "earned upon payment" was void as against public policy, and that the FSLIC was not estopped from seeking return of unearned fees (*id.* at 5a-6a). The court also rejected petitioner's argument that return of the fees would deprive the association of its right to counsel (*id.* at 6a-7a). The court of appeals denied the law firms' petition for rehearing (*id.* at 8a-10a), stating that the issues raised in that petition were either resolved in its opinion or were "frivolous restatement of arguments already presented" (*id.* at 9a).

ARGUMENT

The court of appeals' opinion is correct, it does not conflict with any decision of this Court or of another court of appeals, and it does not present any question of special importance warranting further review. The petition for a writ of certiorari should accordingly be denied.

1. Congress has vested the Bank Board with broad responsibility for regulating federally insured savings and loan associations and maintaining public confidence in the thrift industry. See *Fidelity Federal Sav. & Loan Ass'n* v. *de la Cuesta,* 458 U.S. 141 (1982). Congress has specifically empowered the Bank Board to appoint the FSLIC as receiver for federally insured, state chartered, savings and

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FSLIC in its corporate capacity. Four months later, Fidelity Federal was acquired by Citicorp, N.A.

loan associations experiencing financial distress (12 U.S.C. 1729(c)). The FSLIC, acting as receiver, may liquidate a failing association, take over the assets of and operate such association, organize a new federal association to take over its assets, and merge it with another insured association (12 U.S.C. 1729(b)(1)(A) and (c)(1)(A)). The association has the right, prescribed by statute, to challenge the appointment of the receiver (12 U.S.C. (& Supp. IV) 1464(d)(6)(A) and 1729(c)), and Section 1464(d)(8)(A) specifically provides that the association's legal fees may be paid from the association's assets in the event that the challenge is successful (12 U.S.C. 1464(d)(8)(A)).

As the court of appeals explained (Pet. App. 5a), the Bank Board's longstanding regulations permit the receiver to reject or repudiate "burdensome contracts," (12 C.F.R. 569a.6(c)(3)) and to collect money owed to the failed association (12 C.F.R. 569a.6(a)). The court of appeals correctly held (Pet. App. 5a) that the receiver properly exercised that power in this case by terminating the representation agreement between Fidelity and petitioner and demanding the return of unearned legal fees. Indeed, the receiver routinely takes such actions in the exercise of its receivership functions. See *North Mississippi Sav. & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986) (termination of a supposed deferred compensation agreement). Having been lawfully discharged, petitioner could no longer provide legal services to Fidelity and was obligated to return all sums paid by Fidelity in excess of those actually earned.[4]

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[4] Thereafter, if petitioners represented anyone, it was Fidelity's shareholders and former management. See *Haralson* v. *FHLBB*, 655 F. Supp. 1550, 1558 (D.D.C. 1987).

As the court of appeals explained (Pet. App. 2a, 5a-6a), state law dictates the same result. Under California law, the receiver, as successor-in-interest to Fidelity, has absolute authority to terminate the agreement with petitioner and to recover the unearned fees. California law "holds that a client's power to discharge an attorney, with or without cause, 'is absolute' " (*id.* at 2a, quoting *Fracasse* v. *Brent,* 6 Cal. 3d 784, 791, 494 P.2d 9, 14, 100 Cal. Rptr. 385, 389 (1972)). Upon termination by a client, an attorney is entitled to a *quantum meruit* recovery of the reasonable value of services actually rendered (*Fracasse,* 6 Cal. 3d at 792). See also *Jeffry* v. *Pounds,* 67 Cal. App. 3d 6, 136 Cal. Rptr. 373 (1977); *Weiss* v. *Marcus,* 51 Cal. App. 3d 590, 124 Cal. Rptr. 297 (1975). Thus, California law also required petitioner to return all prepaid but unearned fees upon termination by the receiver.

Relying on the fiction that the prepaid legal fees were "earned upon payment," petitioner claims (Pet. 13) that the fee agreement was a fully executed contract that could not be rescinded by the receiver. The court of appeals correctly rejected that contention. The fee contract required advance payment of unearned fees and was an improper attempt to evade 12 U.S.C. 1464(d)(8)(A) and to prejudice the association's creditors.[5] Thus the receiver would have

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[5] The fee agreement was plainly designed to circumvent Section 1464(d)(8)(A)'s proviso that attorneys' fees incurred in challenging the Bank Board's appointment of a receiver may be paid from the association's assets only if the challenge is successful. See 12 U.S.C. 1464(d)(8)(A). The agreement, which was prepared on the eve of the receiver's appointment, effective set aside a portion of the association's assets as a "war chest" for the association's management to resist the receivership. Under this scheme—and contrary to Congress's expressed intention in Section 1464(d)(8)(A)—management's challenge to the receiver's appointment would be paid from the association's limited assets, to the prejudice of its creditors, even if the challenge were unsuccessful. Thus, this agreement was clearly crafted

been entitled to rescind the fee agreement under state law, which allows rescission of contracts contrary to the public interest (Cal. Civ. Code § 1689 (West 1985)).[6] See Pet. App. 5a-6a.

2. Petitioner next contends (Pet. 16-19) that the court of appeals' decision "sanctions an unconstitutional interference with Fidelity's due process right to retain and consult counsel" (*id.* at 16). The district court properly rejected that contention as moot (Pet. App. 14a). In any event, the argument is without merit.

The Fidelity shareholders' challenge to the appointment of a receiver has been fully adjudicated and rejected. See *Fidelity Sav. & Loan Ass'n* v. *FHLBB,* 689 F.2d 803 (9th Cir. 1982), cert. denied, 461 U.S. 914 (1983). Thus, there can be no live controversy concerning the Fidelity shareholders' access to counsel. Nor was there a controversy on that score when that suit was litigated. As the court of appeals recognized (Pet. App. 6a-7a), Fidelity's shareholders were represented by petitioner throughout those proceedings. Petitioner's invocation of Fidelity's "right to counsel" is accordingly misdirected.[7] The only question here is who should pay counsel's fees. Section 1464(d)(8)(A) provides

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to defeat the congressional policy set forth in Section 1464(d)(8)(A). Indeed, the agreement itself recognized that the FSLIC views such contracts as unenforceable (E.R. 221).

[6] Cal. Civ. Code § 1689 (West 1985) provides as follows:

> (b) A party to a contract may rescind the contract in the following cases:
>
> * * * * *
>
> (6) If the pulbic interest will be prejudiced by permitting the contract to stand.

[7] Moreover, petitioner lacks standing to assert the shareholders' due process rights since the shareholders are not a party in this case. See *Tileston* v. *Ullman,* 318 U.S. 44, 46 (1943) (doctor cannot assert rights of his patients who were not parties to the proceedings).

the answer to that question: Fidelity's shareholders, having failed in their challenge to the Bank Board's appointment of a receiver, must pay the resulting attorneys' fees.[8]

There is no merit to petitioner's suggestion that absent the sort of agreement used here, an association would be unable to retain counsel. An association's shareholders and displaced management (the real parties in any challenge to the appointment of the receiver) can always hire counsel, either through direct payment or on a contingent fee basis, and then—if the suit is successful—seek reimbursement from the association's assets pursuant to 12 U.S.C. 1464(d)(8)(A). See, *e.g., Telegraph Sav. & Loan Ass'n* v. *Schilling,* 807 F.2d 590 (7th Cir. 1986). Indeed, as the court of appeals noted, petitioners in this very case "were still willing to work on the contingency that in the end their theories might prevail" (Pet. App. 7a). Thus, this is not a case where the association's shareholders' were denied access to counsel.[9]

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[8] This case is essentially identical to *Haralson* v. *FHLBB,* 655 F. Supp. 1550 (D.D.C. 1987), where a district court upheld the FSLIC's exercise of its statutory authority to terminate a fee agreement. That court rejected a similar due process argument—advanced by the association's shareholder, rather than his lawyers—explaining (655 F. Supp. at 1558):

> Haralson [the majority shareholder of the two failed institutions] has not been denied his choice of counsel. Susman and Steptoe [his attorneys] have represented Haralson prior to the institution of these proceedings and they still represent Haralson. What this Court understands Haralson to really be seeking is the payment of his legal fees from the assets of the Associations rather than his personal funds.

The court then held that the statute forbade payment of Haralson's fees from the association's assets as he had yet to prevail in the litigation.

[9] Even if no attorney had been willing to advocate the cause on a contingent fee basis, that would not amount to an unconstitutional

3. Petitioner further contends (Pet. 19-24) that the court of appeals abused its discretion in limiting further proceedings on remand. That contention is meritless and, in any event, does not raise a question warranting this Court's review.

The court of appeals properly concluded that this case turned on two dispositive questions: first, whether the FSLIC terminated petitioner's fee agreement; and, second, if so, whether the district court correctly concluded that the FSLIC is estopped from recovering fees paid in advance under that agreement. The court of appeals first determined that the FSLIC terminated that agreement "[a]s simply, clearly and unequivocally as words permit" (Pet. App. 5a). It next rejected the district court's ruling that the FSLIC was estopped from collecting Fidelity's advance payments under the agreement (*ibid.*). The court of appeals explained that the FSLIC had demanded the refund at the time it terminated the agreement and that it had brought suit within the applicable limitation period; accordingly, "there was nothing inequitable in not immediately filing suit for the money" (*ibid.*).

The court of appeals acted well within its discretion in rejecting petitioner's demand that a lengthy list of other issues be considered on remand (Pet. App. 8a-10a). A court of appeals can, of course, determine that its ruling fully resolves other issues in the case.[10] The court properly

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"denial" of counsel. Instead, the inability to attract counsel would reflect the legal community's unanimous judgment that the association's legal claims are insubstantial. See *Cooper* v. *Singer*, 719 F.2d 1496, 1506 n.14 (10th Cir. 1983) (en banc).

[10] See *Viger* v. *Commercial Ins. Co.*, 707 F.2d 769, 774 (3d Cir. 1983) (recognizing that a court of appeals, in reversing a district court decision, may order entry of judgment where there are no material facts at issue, even though appellant did not move for summary judg-

did so here. As the court explained (*id.* at 9a), the questions petitioner seeks to have resolved on remand either are subsumed within those two issues, or are "frivolous restatement of arguments already presented" (*ibid.*). In any event, petitioner's contention that the court of appeals improperly limited proceedings on remand in the particular circumstances of this case does not present a question of general importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ment). See generally 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶¶ 56.12-56.13 (2d ed. 1988).

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